

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-208

In re Applications of

ATLANTIC RADIO File No. BPH-900116MS
COMMUNICATIONS, INC.

GREAT AMERICAN File No. BPH-900117MN
COMMUNICATIONS CORP.

JOHN SENIOR File No. BPH-900117MP
BROADCASTING CORP.

JERSEY DEVIL File No. BPH-900117MT
BROADCASTING
COMPANY

SEAIRA, INC. File No. BPH-900117MU

SOUTHERN OCEAN File No. BPH-900117MX
BROADCASTING
COMPANY

LD BROADCASTING File No. BPH-900117NA
LIMITED
PARTNERSHIP
(now PRESS
BROADCASTING COMPANY)

For Construction Permit for New
FM Station, Channel 289B1,
Manahawkin, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 1992; Released: January 17, 1992

By the Review Board: MARINO (Chairman),
BLUMENTHAL and GREENE.

1. Before the Review Board are a Petition to Intervene and an Appeal, filed October 23, 1991 by Seashore Broadcasting Corporation (Petitioner). Petitioner seeks party status in this proceeding so that it may prosecute an appeal from a *Memorandum Opinion and Order*, FCC 91M-2893, released September 23, 1991 (*MO & O*) by Administrative Law Judge Arthur I. Steinberg (ALJ).¹ The *MO & O* approved a series of settlement agreements, granted the application of Press Broadcasting Company (Press) (formerly LD Broadcasting Limited Partnership (LD)) for a new FM station at Manahawkin, New Jersey, and terminated the proceeding. Oppositions to the intervention petition and appeal were filed by the Mass Media Bureau, and by the above-captioned applicants jointly on Novem-

ber 1 and November 7, 1991, respectively, and petitioner filed a consolidated reply on November 20, 1991. For the reasons set forth *infra*, we will deny the petition to intervene and dismiss the appeal.

BACKGROUND

2. Petitioner is the licensee of station WOBM-FM at Toms River, New Jersey, located approximately twenty miles north of Manahawkin. *Jt. Opp. to Appeal* at 1. It previously filed a petition to deny the application of Jersey Shore Broadcasting Corporation (Jersey Shore), one of the twelve applicants which filed for the instant frequency. Bureau's *Opp. to Pet. to Intervene* at 1. Petitioner argued, *inter alia*, that Jersey Shore had violated Section 73.3518 of the Commission's Rules, 47 CFR § 73.3518, by filing inconsistent applications. *Id.* Jersey Shore is currently the licensee of Station WJRZ(FM) in Manahawkin, New Jersey. *Jt. Opp. to Pet. to Intervene* at 5. The Commission, in designating the above-captioned applications for hearing, agreed with petitioner's argument, granting the petition in part, and dismissing Jersey Shore's application from this proceeding. *Hearing Designation Order*, 6 FCC Rcd 4716, 4717-4718 (1991) (*HDO*).

3. Unbeknownst to petitioner, however, the applicants submitted a joint request for approval of a universal settlement to the Commission prior to the release of the *HDO* (on July 31, 1991). Bureau's *Opp. to Pet. to Intervene* at 2.² The settlement agreements contemplated a grant of Press' application, and the dismissal of the other applications for valuable consideration from Press. *Id.* Jersey Shore was to receive an option, which, if exercised, would allow it to acquire the facility from Press in exchange for its present Manahawkin FM facility. *Id.* at 2-3. The joint request was not acted upon by the Commission because the *HDO* had been adopted (but not released) prior to the submission of the universal settlement. *Id.* at 3. In addition to dismissing Shore's application, *see para. 2, supra*, the *HDO* dismissed Press' application for similarly filing inconsistent applications. *HDO*, 6 FCC Rcd at 4718. To maintain the viability of the earlier settlement and to account for the *HDO*'s dismissal of the proposed permittee, Press, the parties resubmitted their agreements to the ALJ (on August 16, 1991), followed by an amendment by LD to substitute Press as the applicant in the LD application. *Jt. Opp. to Appeal* at 8. The ALJ granted the amendment substituting Press as the applicant and approved the settlement agreements before him, except for one between Press and Jersey Shore. He referred that agreement to the Mass Media Bureau for appropriate action for want of jurisdiction to rule on the agreement, since Jersey Shore's application was not before him. *MO & O* at n.4. On September 24, 1991, one day after the release of the ALJ's *MO & O*, petitioner filed to intervene with the ALJ, accompanied by a consolidated opposition. The ALJ dismissed the petition as moot in light of his earlier order. *Order*, FCC 91M-2946, released September 27, 1991.

PETITION TO INTERVENE

4. Petitioner argues initially that it should be permitted to intervene in this proceeding because the Commission implicitly recognized its standing as a party in interest when it granted, in part, its petition to deny Jersey

Shore's application. It argues further that, because it has learned that Jersey Shore and Press have both attempted to negate the effect of the Commission's rulings in the *HDO* by proposing a settlement that would permit them to elect which facility they wish to receive, thus circumventing enforcement of the inconsistent applications rule, it now wishes to appeal the ALJ's *MO & O*. Finally, it excuses the untimeliness of its requested intervention by stating that it

had no prior reason to seek intervention earlier, for its only concern in the proceeding -- the pending [Jersey Shore] application -- had been properly resolved [i.e., dismissed].

Pet. to Intervene at 10. Petitioner represents that it only learned of the settlement proposals after being alerted by a *Public Notice* that Jersey Shore had filed a petition for reconsideration of its dismissal from this proceeding. It discovered the proposals when inquiring at the Commission about the reconsideration petition. *Id.* at 11. It claims that it would have complied with the 30-day filing requirement prescribed by the rules for intervention petitions had Jersey Shore served it with a copy of the reconsideration petition. *Id.* at 12.

DISCUSSION

5. Section 1.223 of the Commission's Rules, 47 CFR § 1.223, which governs petitions to intervene, provides in paragraph (a) that parties in interest not previously named by Commission:

may acquire the status of a party by filing, under oath and not more than 30 days after the publication in the Federal Register of the hearing issues or any substantial amendment thereto, a petition for intervention showing the basis of its interest Where the person's status as a party in interest is established, the petition to intervene will be granted.

Paragraph (c) of the rule, which along with paragraph (b), governs late-filed petitions, provides:

[a]ny person desiring to file a petition for leave to intervene later than 30 days . . . shall set forth the interest of the petitioner in the proceeding, show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, and must set forth reasons why it was not possible to file a petition within the time prescribed by paragraphs (a) and (b) of this section If, in the opinion of the presiding officer, good cause is shown for the delay in filing, he may in his discretion grant such petition or may permit intervention limited to particular issues or to a particular stage of the proceeding.

6. In the instant case, petitioner has not satisfied the requirements prescribed by Section 1.223. Initially, the 30-day deadline for filing intervention petitions expired on September 11, 1991, nearly one and a half months prior to the filing of the instant petition. The Board has

previously held that the failure to seek intervention earlier due to a lack of knowledge of the proceeding does not excuse a late filing. *See Pacifica Foundation*, 19 RR 2d 631, 633 (Rev. Bd. 1970). More important, petitioner's conceded sole "concern" in this proceeding has previously pertained to the application of Jersey Shore -- and still does, but that application was not before the ALJ, nor was the settlement agreement between Press and Jersey Shore with the option for Jersey Shore to eventually acquire the instant facility part of the agreements approved by the ALJ.³ Thus, petitioner could not qualify as a party in interest *vis - a - vis* Press, even had it filed a petition in a timely fashion. Any objections it now has against the grant of Press' application come too late. Finally, petitioner has not shown how its participation would assist us here. There were no issues pending against Press at the time the ALJ issued his ruling, and petitioner has not set forth any proposed issues warranting its participation. It simply recites facts that are already known about Jersey Shore. That is no basis for intervention. *See Cleveland Broadcasting, Inc.*, 12 FCC 2d 1008, 1009 (1968). In light of our ruling on petitioner's intervention request, we do not reach its appeal. *See* Section 1.302 of the Commission's Rules, 47 CFR § 1.302 (only parties may appeal a ruling of the ALJ which terminates a hearing proceeding); *cf. Raveesh K. Kumra*, 6 FCC Rcd 4837, 4838 (Rev. Bd. 1991).⁴

7. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike Joint Opposition to Notice of Appeal, filed October 15, 1991, by Seashore Broadcasting Corporation IS DISMISSED as moot; that its Petition to Intervene, filed October 23, 1991, IS DENIED; and that its Appeal, filed on the same date, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

¹ On October 3, 1991, petitioner filed a Notice of Appeal, pursuant to Section 1.302(b) of the Commission's Rules, 47 CFR § 1.302(b). A Joint Opposition to Notice of Appeal was filed on October 11, 1991 by the above-captioned parties, and petitioner responded by filing a Motion to Strike Joint Opposition to Notice of Appeal on October 15, 1991. We will dismiss the motion to strike as moot in light of our disposition.

² Three applicants did not participate in the settlement, but two had their applications designated for hearing. Those applications were subsequently dismissed by the ALJ, *see Memorandum Opinion and Order*, FCC 91M-2866, released September 19, 1991, and are not pertinent here.

³ The above-captioned applicants report that the settlement agreement between Press and Jersey Shore was approved by the Mass Media Bureau's Audio Services Division by letter dated September 27, 1991, and that petitioner filed a petition for reconsideration of that action on November 5, 1991. *Jt. Opp. to Pet. to Intervene* at 2 n.2; *Jt. Opp. to Appeal* at 4 n.2. If Jersey Shore elects to exercise its option, and a Press/Jersey Shore

assignment application is actually filed, Seashore may assert at that time any rights that it possesses. Until then, its arguments against Jersey Shore are in the wrong forum and premature.

⁴ Because we perceive no plain legal error, we will not review the merits of the ALJ's *MO & O* on our own motion. We have recently approved a similarly resubmitted and revised settlement agreement filed between the adoption and release dates of a hearing designation order. See *Judith O. and Larry R. Orkus*, FCC 91R-119, released January 2, 1992. There, as here, the proposed permittee's application was dismissed by the designation order, requiring the substitution of the principals from the dismissed application for the principals of one of the applications still extant. The filing of inconsistent applications does not automatically implicate an applicant's character. The sanction for such a violation is generally a simple dismissal of the latest-filed application, with the original application remaining grantable. See *Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493, 3494 (1987). Moreover, because the agreements were originally filed on July 31, 1991, and not substantially revised, this case is distinguishable from *SBM Communications, Inc.*, 6 FCC Rcd 5522 (1991), where the Commission held that settlement agreements filed one day after July 31, 1991, were subject to new rules, effective August 1, 1991, limiting settlement agreements to legitimate and prudent out-of-pocket expenses. *Settlement Agreements Among Applicants For Construction Permits*, 6 FCC Rcd 85 (1990), modified, 6 FCC Rcd 2901 (1991). The ALJ ruled here that the pre-August 1, 1991 settlement rules were applicable to the agreements before him. *MO&O* at n.7. See also *Judith O. and Larry R. Orkus*, at n.2.